No. 9564

United States

Circuit Court of Appeals

For the Ninth Circuit

TOM WING ART, alias WING FOOK TOM, alias SHORTY YUEN,
Appellant,

vs.

WILLIAM A. CARMICHAEL, District Director of U. S. Immigration and Naturalization Service, District No. 20,
Appellee.

Upon Appeal from the District Court of the United States for the Southern District of California, Central Division.

Appellant's Opening Brief

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STATEMENT OF THE QUESTIONS INVOLVED.

1. Whether the facts, as found by the examining inspector and the Board of Review are sufficient to establish that appellant is an alien "found connected with the management of a house of prostitution" or "who manages . . . a house of prostitution," deportable offenses denounced in clauses 6 and 7, Section 19 of the Immigration Act of February 5, 1917;

2. Whether such facts are sufficient to establish that appellant has "received, shared in or derived benefit from any part of the earnings of a prostitute";

3. The power and authority vested in the Secretary of Labor by the provisions of the Immigration Act of February 5, 1917, to deport an alien, lawfully admitted into the United States and permanently residing therein, for acts committed subsequent to such entry and years prior to the commencement of these deportation proceedings and the record establishes that such alien at present time and for some years prior thereto has engaged in or been connected with the denounced activities.

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Appellant's Opening Brief

OPENING STATEMENT

This is an appeal from the order of the District Court of the United States in and for the Southern District of California denying appellant's Petition for a Writ of Habeas Corpus and remanding appellant to the custody of the immigration authorities.

The original Petition for Writ of Habeas Corpus together with an Order to Show Cause why such Writ should not be granted was presented to the Honorable George Cosgrave, Judge of the District Court of the

United States in and for the Southern District of California; said order to show cause was made by said United States District Court; that thereafter the matter was set for hearing upon the Government filing its return to the Writ; the matter was heard upon written briefs and after due consideration the Court made its order denying said Writ as stated above.

THE FACTS

Appellant accepts the findings of the Board of Review and the examining inspector as the facts involved in present proceedings, a resume of such facts is as follows:

Appellant concedes the facts to be as stated in the summary prepared by the examining inspector and set forth in the memorandum filed by the Board of Review in the course of the proceedings had herein before the Secretary of Labor.

These findings relate to three establishments where prostitution was practiced; the Government contending that appellant was "managing," or was connected with the management, of the immoral business conducted in each of these establishments. The name of these establishments and the time during which the Government contends that appellant was such manager, or was connected with the management of the business conducted therein, are as follows:

DE LUXE ROOMS—November, 1932, to January 28, 1934.

ARDMORE ROOMS—July, August and September, 1936.

ISLAND HOTEL—First part of January, 1937.

Appellant will segregate the facts found by the examining inspector in his summary and those found by the Board of Review in their memorandum and rearranging them in accordance with their relationship toward each of these establishments.

DE LUXE ROOMS:

The Board of Review found:

That Lorriane Gordon testified "that during November, 1932, she obtained employment as a prostitute in the De Luxe Rooms and worked there as a prostitute," for two weeks; that a blonde woman named "Jean," during that period was the "landlady" and who "was then sharing the same bedroom in that establishment with the alien."

That during June, 1933, she returned to work at the De Luxe Rooms as a "prostitute"; "that the alien was not then living in the De Luxe Rooms but that he called almost every night and at intervals 'checked' with Jean Alvarada, the new 'landlady', the amount of money taken in by the establishment and received a share of that money";

That about the first of November, 1933, while in the De Luxe Rooms, the alien suggested that she (Lorriane Gordon) serve as "landlady in charge" of the De Luxe Rooms for him and that after about two conversations regarding the details she took charge of the activities at the De Luxe Rooms as a subordinate of this alien;

that Lorriane Gordon testified that she and this alien agreed that the net proceeds of the business of the De Luxe Rooms were to be divided equally between them and in accordance with that agreement she worked for the alien until the latter part of January, 1934, . . . when she left his employment in the De Luxe Rooms. (Memorandum filed by Board of Review; Immigration Record.)

The examining inspector in his summary found:

That Lorriane Gordon testified that during November, 1932, she worked two weeks at the De Luxe Rooms as a prostitute; that the "landlady" at that time, "and Lorriane Gordon's immediate superior, was a blonde woman named "Juean", surname not remembered and present whereabouts unknown, who was living in concubinage and sharing the same bedroom in that establishment with the subject alien." (Immigration Record, page 244.)

ARDMORE ROOMS:

The Board of Review found:

That Lorriane Gordon testified "that several months after she went to work at the De Luxe Rooms in June, 1933, Mrs. Alvarado moved to the Ardmore Rooms on 4th Avenue and for a short time functioned as landlady of both houses . . . she also testified that during this period the alien spent much time at the Ardmore Rooms and on several occasions she, when working there as a prostitute, saw Mrs. Alvarado and the alien dividing the proceeds of the prostitution business conducted at that place";

That Norma Bondley Lickert testified "that for about three months beginning in July, 1936, she acted as 'landlady' of the Ardmore Rooms during the temporary illness of the regularly employed 'landlady,' a woman named Dorothy." It was according to Miss Lickert's testimony agreed between her and Dorothy that she, Miss Lickert, "should receive the said Dorothy's share of the net proceeds being one-third of the total"; that Dorothy instructed her to collect from the prostitutes all the money received by them and to deposit that money in a desk in one of the rooms until the close of the working day or night and then to re-distribute to the prostitutes the portions of their receipts to which in accordance with the house's custom they were entitled." Dorothy said "that the remainder of that was to be retained pending a final accounting with Georgia Buck, Dorothy's employer"; "Dorothy told her Georgia and Tom Quin were associated in the operation of several houses of prostitution and that the alien was Tom Quin's collector."

That Miss Lickert testified "that Dorothy informed her that the alien was the 'boss' and that he himself represented himself to be the 'boss' of the business in the Ardmore Rooms on one occasion after having suggested that she become his mistress"; that "the alien lived in a small building in the yard behind the two story building on the second floor of which the Ardmore Rooms were located"; "that alien possessed a key which fitted a lock in the rear entrance door of the Ardmore Rooms"; "that he called frequently in those rooms, used

the telephone there, and in the presence of Miss Lickert he on one occasion reprimanded a prostitute who seemed to appear to him to be neglecting her work"; "that his general demeanor was that of one in a position of authority, superior to the 'landlady' "; "that Dorothy instructed her to pay over to this alien the house's division of the business when he should call for it and that on one occasion during August, 1936, he did call for that purpose and that he obtained from her the key to the desk where the money was kept and took the money." (Memorandum filed by Board of Review; Immigration Record.)

The examining inspector in his summary found:

That Miss Lickert testified that "during those three months she heard Dorothy and others talking of Tom Quin and his interests from time to time, but did not see him"; "that the alien reprimanded and issued verbal instructions in the presence of her, Miss Lickert, to at least one prostitute who was, in his opinion, neglecting her work, and his general demeanor was that of one vested with authority superior to the 'landlady' "; "that Dorothy instructed her, Miss Lickert, to surrender to this alien the 'house's' division of the proceeds of the business, if he should call for it, and once, during August, 1936, he did call for that purpose, obtained from her the key to the desk where the money was kept, and took it. ON ALL OTHER OCCASIONS DURING THAT THREE MONTHS GEORGIA BUCK COLLECTED FOR THE 'HOUSE' AND DID THE 'CHECKING UP' WITH MISS LICKERT." (Immigration Record, page 245.)

ISLAND HOTEL:

The Board of Review found:

That Lorriane Gordon testified that "during the first part of 1937, she worked as a prostitute for a short time in the 'Island Hotel' when the 'madame' in that place was a woman named 'Carmen' "; "she gave it as her understanding that the alien and Georgia Buck were the operators of the establishment and the employers of 'Carmen'." (Memorandum filed by Board of Review, Immigration Record.)

The Board of Review summarized the testimony given by Wyman E. Ward, William E. Ash, Herbert J. Collins, called by the Government in rebuttal, in the following language:

> "The four additional witnesses who were called by the examining inspector: Wyman E. Ward, William E. Ash, Herbert J. Collins and Steve Reto, furnished testimony which clearly preponderates to establish that this alien has been actively associated with the businesses of gambling and commercialized vice in San Diego throughout virtually all the time of his residence in that city and tends to corroborate the direct evidence furnished by the witnesses Mrs. Gordon and Miss Lickert that this alien has been deriving benefits from the earnings of prostitutes and connected with the management of places of prostitution." (Memorandum filed by Board of Review; Immigration Record.)

The examining inspector in his summary of the evidence found:

That WYMAN E. WARD testified "that Tom Quin was generally believed to be engaged in the business of

prostitution and to control gambling among the Chinese people of San Diego; . . . that he has seen the alien in Georgia Buck's place; that Rita Morgan was an old-time prostitute . . . ; that she was believed to operate the De Luxe Rooms immediately prior to her arrest there during June, 1932; that he knew as a matter of police history that Rita Morgan and the alien had been found in bed in one of the rooms of the Mitchell Hotel." (Immigration Record, page 250.)

The examining inspector in his summary of the evidence found:

That WILLIAM E. ASH testified he had been an employee of Virgil Bruschi, an old time resident in San Diego's Chinatown where he conducted a grocery store; that he, Ash, had worked in this store for many years prior to 1937; he knew Tom Quin intimately for many years; during the last ten years of his life Tom Quin was known as "The Mayor of Chinatown," had control of the gambling and control of prostitution; that the alien was rumored to be associated with Tom Quin and to be Tom Quin's body guard; . . . that he was acquainted with Georgia Buck and her establishment, the Regal Rooms, a house of prostitution; "that it was generally believed that Georgia Buck and Tom Quin were associated in the business of prostitution and that she acted as collector for him;" . . .

That numerous times during a period of eight years he saw the subject alien and Rita Morgan together; that several lottery gambling establishments were reputed to be owned by Tom Quin. . . . (Immigration Record, page 250.)

The examining inspector in his summary of the evidence found:

That HERBERT J. COLLINS "testified to the effect . . . that during 1927 or 1928 when he was a taxi-cab driver—he transported the alien in a taxi-cab to the De Luxe Rooms . . . two or three times; that he believed Rita Morgan to be the proprietor of the De Luxe Rooms; that he had seen Rita Morgan and the alien together at the Ferris and Ferris Drug Store at 5th and Market Street, San Diego; that he had heard that Rita Morgan was the alien's mistress; that he was not acquainted with Tom Quin, but had heard persons refer to him as 'The Mayor of Chinatown'." (Immigration Record, page 251.)

The examining inspector in his summary of the evidence found:

That STEVE RETO testified that he had, some six or seven years prior to May, 1938, been employed by Tom Quin as manager of one of his gambling houses; that subject alien was also employed by Tom Quin in same gambling house some six or seven years prior to 1938; that he frequently, as messinger for Tom Quin, went in search for subject alien; lots of times located him at the Ardmore Rooms (upstairs in the hotel part, where prostitution was practiced); that he believed the subject alien had a room in the "Ardmore" because he found him there so many times. (Immigration Record, Page 251.)

THE ISSUES

The principal issues in this appeal are concisely set forth in the "Statement of Points" on which Appellant intends to rely, especially as to:

1. That the record contains no evidence tending to establish that appellant "received, shared in or derived benefit from the earnings of a prostitute";

2. That the record contains no evidence tending to establish that appellant was "found connected with the management of a house of prostitution";

3. That the record contains no evidence tending to establish that applicant was "found managing a house of prostitution, or music or dancehall or other place of amusement, or resort, habitually frequented by prostitutes, or where prostitutes gather";

4. That the record contains no evidence tending to establish that appellant has committed any deportable offense;

5. That the record contains no evidence that appellant was "found connected with the management of a house of prostitution" or "found managing a house of prostitution, etc." at time the warrant of arrest was issued by Secretary of Labor or at time of his arrest;

6. That the record contains no evidence tending to establish that appellant has committed any of the deportable offenses set forth in the Warrant of arrest or contained in the Warrant of Deportation issued by Secretary of Labor under which the said Secretary of Labor seeks to deport appellant from the United States.

POINTS AND AUTHORITIES

Power and Authority of the Secretary of Labor to Deport a Resident Alien.

The present proceedings were brought by the Secretary of Labor under the powers and authorities conferred upon him by the Immigration Act of February 5, 1917, Section 19, clauses 6 and 7, which provide:

> "any alien who is hereafter . . . found an inmate or connected with the management of a house of prostitution . . . or shall receive, share in or derive benefit from any part of the earnings of any prostitute . . . shall upon the warrant of the Secretary of Labor, be taken into custody and deported. . . ."
>
> Clause 6.
>
> "any alien who manages or is employed by, in or in connection with any house of prostitution . . . shall upon the warrant of the Secretary of Labor, be taken into custody and deported. . . ."
>
> Clause 7.

The examining inspector and the Board of Review both

> "agree that the third of the charges in the warrant of arrest; that the alien is an inmate of a house of prostitution, should be withdrawn as not established by the evidence."

The Secretary of Labor has made no charge that appellant is, or was, "employed in, by or in connection with any house of prostitution."

The power and authority of the Secretary of Labor to deport a resident alien out of and away from the United States is purely statutory and to justify an order deporting a resident alien the burden of proof is upon the Government to establish that the resident alien has committed an offense denounced by Congress as ground for such deportation.

Section 221, Title 8, Aliens and Citizenship, U. S. C. A. provides:

> "Whenever any alien attempts to enter the United States the burden of proof shall be upon such alien to establish that he is not subject to exclusion under any provision of the Immigration Laws; and in any deportation proceedings against any alien the burden of proof shall be upon such alien to show that he entered the United States lawfully, and the time, place and manner of such entry into the United States."
>
> "This section (Section 221, supra) however, has no application to the case under consideration, for the appellant here was charged with an offense alleged to have been committed after a lawful entry into the United States. We believe the true rule to be that, in proceedings involving the right of the United States to deport an alien whose entry into the United States in the first instance was lawful, the alien has the burden of establishing his right to remain, but, where the right to deport is based on the misconduct of the alien subsequently to his entry, the presumption of innocence obtains, and the burden is upon the Government to establish the fact of guilt."
>
> Werrman v. Perkins, 79 Fed. (2) 467; 7th cir.

The Government concedes that appellant was lawfully admitted to enter the United States, at the Port of San Francisco, California, on June 12, 1921, as a son of a Chinese Government Official and since 1922 has resided continuously at San Diego, California. (Memorandum filed by Board of Review, Immigration Record.)

The Secretary of Labor, in the exercise of this power and authority must also comply with certain laws and legal principles generally accepted by our judicial system.

> "If person sought to be deported is not afforded a full, adequate hearing, in which findings are supported by substantial evidence, or if the law is mistakenly applied in deportation proceedings, judicial relief may be had by the writ of Habeas Corpus."
>
> Bata Shoe Co. v. Perkins, 33 Fed. Supp. 508.
>
> "There was also a protest against the efforts made to prevent the deportation of the Katz Brothers wherein it is averred that 'It has been a matter of common knowledge that they were profiting by the earnings of a prostitute.'
>
> "These affidavits and protests contain the strongest showing made against Joseph Katz respect his alleged receiving of the earnings of a prostitute or prostitutes. The very best that can be made out of the testimony, and the whole thereof contained in the record is that it is wholly hearsay and based upon common repute in the vicinity; the affiant generally asservating upon information and belief. There is practically no substantive

> testimony of fact. Locally—that is, in the State of California—the fact that a house is being conducted as a house of ill-fame, may be shown by common repute; but there is no rule of which we are aware by which the ownership or management of such a house may be so proven."
>
> Katz v. Commissioner, 245 Fed. 316; 9th Cir.

Appellant submits that no matter how reprehensible the Secretary of Labor may think his conduct is, nevertheless, if this misconduct is not denounced by Congress and the Secretary of Labor directed to deport such alien upon proof of guilt, the Secretary of Labor is without power to make any lawful order for his deportation.

The intent and purpose of the provisions of Section 19, Immigration Act of February 5, 1917, is to remove from the United States certain well defined classes of alien whose acts and conduct appear to Congress to be detrimental to the general welfare of the United States; it operates upon those aliens that fall within those classes. The Immigration Act of 1917 does not provide for the deportation of aliens who "have been actively associated with the businesses of gambling and commercialized vice," or for aliens who are employed by those associated with gambling or commercialized vice.

> "The power to regulate and suppress brothels and bawdy-houses, which includes the regulation of leasing houses or buildings for such purposes, is police in character, and in general, is exercised by the states and local municipalities, rather than by

> the general government; and the statute in question manifests no intendment to encroach upon or interfere with such regulations. It deals, as we have seen, with certain alien classes, and provides for the deportation of aliens comprised thereby, and, considering the spirit and purpose of the statute, we think that there is no intendment to include an alien landlord, who leases to a prostitute the house in which she lives and practices prostitution and receive from her the rental thereof."
>
> Katz v. Commissioner, 245 Fed. 316; 9th. Cir.

The power and authority of the Secretary of Labor to deport aliens out of and away from the United States are limited to such aliens as are members of one of the various classes expressly set forth and defined by the acts of Congress. Congress has not seen fit to vest the Secretary of Labor with power and authority to deport aliens who "have been actively associated with the businesses of gambling and commercialized vice"; the same is true as to those aliens who own buildings and lease them to prostitutes for the purpose of conducting such immoral business, and those aliens who receive a part of a prostitute's earnings for services rendered or merchandise delivered to such prostitute.

MANAGEMENT

The Government contends that appellant was "found managing a house of prostitution" and that he was "found connected with the management of a house of prostitution." The examining inspector and the Board of Review do not designate in their findings any partic-

ular house of prostitution that the Government claims appellant managed or was connected with the management thereof; and the findings failed to indicate the time or times during which it is claimed appellant managed or was connected with the management of any house of prostitution.

Appellant contends that the facts found by the examining inspector and the Board of Review are insufficient, in law and in fact, to sustain the conclusion of the Secretary of Labor that "appellant has been found connected with the management of a house of prostitution," or that he "has been found managing a house of prostitution."

The "facts," so far as material to the issues relating to "management," are as follows:

1. That during June, 1933, appellant called almost every night at De Luxe Rooms and "at intervals 'checked' with the 'landlady' the amount of money taken in by the establishment and received a share of that money";

2. That about November 1, 1933, Lorriane Gordon, the witness, "took charge of the activities at the De Luxe Rooms as a 'subordinate' of appellant"; that she testified that she and this alien agreed that the net proceeds of the business of the De Luxe Rooms were to be divided equally between them and in accordance with that agreement she worked for the alien until the latter part of January, 1934";

3. That in June, 1933, appellant "spent much time at the Ardmore Rooms and on several occasions Lorriane Gordon, when working there as a prostitute, saw

the 'landlady' and the alien dividing the proceeds of the prostitution business conducted at that place";

4. That during July, August and September, 1936, Miss Lickert acted as 'landlady' at the Ardmore Rooms, the regular 'landlady,' Dorothy, being ill; that Dorothy told her "that the balance of the daily receipts of the prostitution business, after distributing to the prostitutes their share or portion thereof" . . . "was to be retained pending a final accounting with Georgia Buck, her employer" . . . "that Georgia Buck and Tom Quin were associated in the operation of several houses of prostitution and that the alien was Tom Quin's collector";

5. That Dorothy instructed her, Miss Lickert, "to pay over to this alien the house's division of the business when he should call for it and that on one occasion during August, 1936, he did call for that purpose and obtained from her the key to the desk where the money was kept and took the money"; that "on all other occasions during that three months Georgia Buck collected for the 'house' and did the 'checking up' with Miss Lickert" (examining inspector's summary, supra);

6. That appellant, in the presence of Miss Lickert, "on one occasion reprimanded a prostitute who seemed to appear to him to be neglecting her work"; "that the alien reprimanded and issued verbal instructions in the presence of Miss Lickert to at least one prostitute who was, in his opinion, neglecting her work";

7. That Dorothy informed Miss Lickert "that the alien was the 'boss,' and that he himself represented

himself to be the 'boss' of the business in the Ardmore Rooms on one occasion after suggesting that she become his mistress'';

8. The opinion of Miss Lickert that appellant's general demeanor was that of one vested with authority superior to the 'landlady'.''

Appellant will discuss later in this brief the question whether ''checking'' with the ''landlady,'' or manager in charge of the business conducted in a house of prostitution, ''the amount of money taken in by the establishment and receiving a share of that money,'' as collector for another, is subject to deportation under clause 6, Section 19, Immigration Act of February 5, 1917, as an alien ''found receiving, sharing in or deriving benefit from the earnings of a prostitute.'' Appellant for the present, addressing his argument solely to the question whether the facts here presented constitute the deportable offense of managing, or being connected with the management, of a house of prostitution.

Before taking up the main point, appellant directs the Court's attention to the sixth, seventh and eighth clauses above set forth, and submits that the matters therein stated should be disregarded in that the same are but the opinion or deduction of the witness and the record does not contain evidence establishing the necessary data to support such opinion or deduction.

6. Miss Lickert's opinion or conclusion that appellant ''on one occasion reprimanded a prostitute who seemed to appear to him to be neglecting her work'' or

as stated by the examining inspector "the alien reprimanded and issued verbal instructions in the presence of Miss Lickert to at least one prostitute who was, in his opinion, neglecting her work."

The evidence in relation to the incident referred to by the Board of Review and the examining inspector, is as follows:

> "Q. Did you ever talk to Shorty Yuen about prostitution in the Ardmore Rooms while you were there?
>
> A. Yes, because this little Johnnie—I guess she had been out the night before—she was supposed to be at work at 11:00 and she layed down on the couch and went to sleep and Shorty came up and I was in the back room and didn't answer the door, and he shook her and told her to get back there that there was somebody back there. I came from the back room about the time he went in there and shook her." (Miss Lickert's *ex parte* statement before Immigration Officer; Exhibit "C," page 4.)

The foregoing excerpt of the testimony taken from the Immigration Record contains no language that could possibly support the "assumption" that appellant had "reprimanded" the girl referred to, "issued verbal instructions" to her, or that appellant was of the opinion that this girl was neglecting her work. Appellant finds no other reference to the incident in the Immigration Record.

Such testimony lacks probative force and is incompetent, as a matter of law, to substantiate the charges set forth in the warrant of arrest.

7. The finding "that the alien was the 'boss,' " and that he "represented himself to Miss Lickert to be the 'boss' of the business in the Ardmore Rooms on one occasion after suggesting that she become his mistress"; such finding is based upon the deduction or conclusion of Miss Lickert, not the statements made by appellant to her at that time. Without knowing what was said and done at that time neither the Board of Review nor this Court can ascertain whether the deduction or conclusion of the witness drawn therefrom was warranted. Besides it appears from the circumstances as disclosed by the witness that these statements were the vaporings of an alcoholic mind or an amorous soul—boasting indulged to lend importance or glamor to the speaker—which were not, at the time, even convincing to those in whose presence they were made.

8. The examining inspector, in his summary of the evidence, finds that appellant's "general demeanor was that of one vested with authority superior to the 'landlady's' "; the Board of Review makes a similar finding; a conclusion or deduction drawn by the inspector and the Board of Review from facts and circumstances not appearing in the Immigration Record. Whether the opinion expressed in the findings be that of the Board of Review or, of the witness Miss Lickert, it has no probative value in that the record contains no data upon which such an opinion could be based. Appellant has been unable, after close search of the Immigration Record, to find that any such opinion or conclusion was testified to during the hearing and Counsel for the Government and the Board of Review have

given no citation where the same, if contained in the Immigration Record, can be found.

Appellant submits that the findings made by the Board of Review to the effect that appellant was found managing, or connected with the management, of a house of prostitution, are based upon the following facts, to wit: that during 1933, the appellant, as an agent or employee of Tom Quin, "checked" with the landladies who managed the business conducted at the De Luxe Rooms and the Ardmore Rooms the amount of money taken in by each of these establishments and "received a share of that money"; and that upon one occasion, during August, 1936, appellant, on behalf of Georgia Buck and in her interest and for her benefit, called at the Ardmore Rooms and "obtained from Miss Lickert, the landlady in charge of the business conducted in said establishment, the key to the desk where the money was kept and took the money."

What relationship existed between Tom Quin and these establishments during these times does not appear in the record; that he did not participate in the management of the business conducted therein must be conceded in that the Board of Review made no finding to that effect; the same is true as to the relationship of Georgia Buck with the Ardmore Rooms.

Appellant contends that "checking" accounts of the business conducted at an establishment, even though such establishment be a house of prostitution, is not the offense denounced in Section 19, Immigration Act of February 5, 1917, to wit: managing, or being connected with the management, of a house of prostitution.

The word "manage" has a well defined and generally accepted meaning; according to the dictionaries, it means: "to control, direct or conduct; to guide or contrive; to carry on or regulate business or affairs." The word "management" is "the act of managing, controlling or conducting."

The Government makes no contention that Appellant "controlled, directed or conducted" the business carried on in these establishments by the landlady in charge thereof.

The sort of acts and conduct on the part of an alien in and about a house of prostitution from which it may be permissible to presume that such alien "manages" or "is connected with the management" thereof, are stated in the opinion of the United States Circuit Court of Appeals, in Psimoules, 22 Fed. 118, wherein the following language appears:

> "That an alien who assumed to dictate the terms of sale of an interest in the business carried on in a house of prostitution, endeavored to secure a prostitute to work for him there, and had a telephone there in his name and rented by him through which much of the business transacted, was connected with the management of the house."

While appellant concedes such acts mentioned above are not the exclusive indicia of management, nevertheless appellant contends the acts and conduct claimed to be evidence of management must be of a similar character and import and relate to the business denounced by the statute.

RECEIVING, SHARING IN OR DERIVING BENEFIT FROM THE EARNINGS OF A PROSTITUTE

The Government relies upon the same facts to establish the charge that Appellant "has been found receiving, sharing in or deriving benefit from the earnings of a prostitute" as urged as proof that appellant was "found managing a house of prostitution" and found "connected with the management of a house of prostitution," to wit: that appellant, as employee or agent for Tom Quin, received a part of the net proceeds derived from the business conducted at the De Luxe Rooms and, as agent for Georgia Buck, received on one occasion a part of the net proceeds derived from the operation of the Ardmore Rooms.

The record throws no light upon the consideration received by the "landladies" in exchange for the part of their net proceeds that were paid to Tom Quin or to Georgia Buck, or any evidence of any right or interest, either in the buildings where the business of prostitution was conducted or in such business, that might entitle Tom Quin or Georgia Buck to share in the net proceeds of the business.

The burden of proof rests upon the Government to establish by substantial evidence that appellant "received, shared in or derived benefit" personally and for his own use and purposes, a part of the earnings of a prostitute. That appellant "received" a part of the earnings of a prostitute, as agent of Tom Quin or Georgia Buck, and on behalf of and on account of

money due to Tom Quin and Georgia Buck, which funds immediately such collection were turned over by appellant to said Tom Quin and Georgia Buck, is not sufficient to establish that he, appellant, "received, shared in or derived benefit" from the earnings of a prostitute. The Government must go further and prove that appellant retained some part or portion of these moneys for his own use and benefit; that his employer to whom he delivered the funds used them for his, the employer's benefit and purposes after appellant delivered the same to him, is not evidence that appellant "received, shared in or derived benefit" from the earnings of a prostitute.

Appellant contends that clauses 6 and 7, Section 19, Immigration Act of February 5, 1917, define separate and different classes of alien subject to deportation; that the language and provisions contained in one clause cannot, by judicial construction, be made a part of any other clause describing classes in said Section 19. Clause 6 relates to inmates of houses of prostitution, prostitutes and those connected with the management; clause 7 relates to alien who manage, or who employed in, by or in connection with a house of prostitution.

The Immigration Statute does not make, the "receiving, sharing in or deriving a benefit" from the earnings of one who manages a house of prostitution or from the profits arising from the operation of such a house, a deportable offense. The provision in the first clause quoted, to wit: "an inmate of or connected with the management of a house of prostitution . . .

who shall receive, share in, or derive benefit from any part of the earnings of any prostitute" is directed at a well known class which is described by the United States Circuit Court of Appeal, Ninth Circuit, in Katz v. Commissioner, 245 Fed. 316, wherein the court said:

> " . . . but in the same connection, is included any alien who shall receive, share in or derive benefit from the earnings of any prostitute. This alludes to another class, but allied in association to the prostitute class. It is perfectly well known what this class is. There are many vile persons of the male sex who allow themselves to be 'supported by' (using the language of Section 2), and take the earnings of, fallen women, which they appropriate to their own particular use, and many of them have no other visible means of livelihood. This is not to say that women may not be guilty of keeping a brothel; but the two classes are clearly defined, so that there need be little uncertainty as to the style or character of the persons Congress designed to comprise by such classification. It is quite unreasonable to suppose that the drygoods salesman or the grocer, who sells his goods to a fallen woman and takes the price from her, or a cabman, who carries her for hire and receives the hire from her, or, as in the present case, the landlord, who rents her abode to her and takes rental therefor, all or any of them were designed to be classified as persons who receive or derive benefit from the earnings of a prostitute, and such, we are impressed, is not the intendment of the statute. . . . considering the spirit and purpose of the statute, we think that there is no intendment to include an alien landlord, who leases to a prostitute

> the house in which she lives and practices prostitution and receives from her the rent thereof."
>
> Katz v. Commissioner, 245 Fed. 316; 9th. Cir.

That the alien who receives, shares in or derives a benefit from a prostitute must be an inmate of or connected with the management of house of prostitution was also stated in the case of In re Abeldano, 11 Fed. Supp. 1021, United States District Court, Texas:

> "Alien did not live with the prostitute at the place where she carries on her trade, nor did he participate or benefit by her earnings except indirectly in jointly contributing to the payment of the rent of a living room jointly occupied by them. Her place of business was at a house of prostitution where she sold herself for a price. The relations between Abeldano and the woman were personal and private, not public. The case was brought to the attention of immigration officers through a quarrel between the relator and the government witness, Estafana, thus using the government to punish him for asserted wrongs already condoned. The law thus to serve as a means of revenge for the prostitute rather than that justice might be done. The effect of deportation is banishment from this, his country, after 25 years residence."

Appellant submits that the record contains no finding that appellant ever received any part of the earnings of a prostitute derived from her immoral conduct, or that he received or retained, for his own use and benefit, any part of the proceeds derived from the business conducted in any house of prostitution. That the provisions of Section 19, Immigration Act of 1917,

do not make a resident alien who receives money from the manager or owner of a brothel, not the proceeds of her own immorality, subject to deportation by the order of the Secretary of Labor.

POWER TO DEPORT MUST BE EXERCISED DURING PERIOD WHEN ALIEN A MEMBER OF THE UNDESIRABLE CLASS.

The Immigration Act of February 5, 1917, Section 19, clauses 6 and 7, provides that the alien must be "found" "connected with the management of a house of prostitution," the "alien who manages . . . a house of prostitution" may be deported any time after his entry into the United States. The last clause authorizes the deportation of an alien regardless of how long he has resided in the United States if he should become a member of the objectionable classés made subject to deportation by the statute. This clause is not a statute of limitation permitting the bringing of deportation proceedings against a resident alien who, some five years prior to such proceedings being commenced, had been a member of the deportable class but who for more than five years has not been a member of such class. The precise point was before the United States Supreme Court in the recent case of Kessler v. Stecker, 83 Law Ed. 637, wherein it was stated:

Kessler v. Strecker, 83 Law Ed. 637.

The Government offered in evidence . . . membership book in Communist Party of the United States

of America issued November 15, 1932, showing dues paid to the end of February, 1933. No evidence alien was a member after March 1, 1933.

> "The Government does not attempt to support the warrant of deportation on the second and third grounds therein specified, namely, that the respondent 'is a member of or affiliated with' an organization described in the Act. The only evidence of record is that his membership ceased months before the issue of the warrant for his arrest. The contention is that respondent is deportable because, after entry, he became a member of a class of aliens described in Section 1 of the act, to wit, a member of the communist party. . . .
>
> This contention presents the question whether the act renders former membership in such organization, which has ceased, a ground of deportation. Respondent insists that the statute makes only present membership in an organization described in the act such ground.
>
> Section 1, of the act of October 18, 1918, as amended in 1920, has to do with the exclusion of alien immigrants and specifies five classes, members of which may not be admitted to the United States. Section 2 of the Act of 1918, which was not altered by the Act of 1920, deals with deportation. It provides that 'any alien who, *at any time,* after entering the United States, is found to have been at the time of entry, or *to have become thereafter,* a member of any one of the classes of aliens enumerated' in section 1, upon warrant of the Secretary of Labor be taken into custody and deported in the manner provided by law.

Relying on the phrases italicized in the quotation, the Government insists that the section embraces an alien who, after entry, has become a member of an organization, membership in which, at the time of his entry, would have warranted his exclusion, although he has ceased to be a member at the time of his arrest. We hold that the Act does not provide for the deportation of such an alien. This conclusion rests not alone upon the language, but, as well, upon the context and the history of the legislation."

"In the absence of a clear and definite expression, we are not at liberty to conclude that Congress intended that any alien, no matter how long a resident of this country, or however well disposed toward our Government, must be deported, if at any time in the past, no matter when, or under what circumstances, or for what time, he was a member of the described organization. In the absence of such expression we conclude that it is the *present membership* or *present affiliation*—a fact to be determined on evidence—which bars admission, bars naturalization, and requires deportation."

Counsel holds no brief approving or condoning the acts and conduct of those who are associated or connected with, or participate in the vicious system that, according to the Immigration Record, appears to have prevailed in San Diego some years ago, under which certain persons levy and collect from the owners of gambling houses and houses of prostitution a part of their proceeds for the "privilege" of operating such illegal and immoral establishment in the community.

However, counsel does contend that Congress has not made the "association with commercialized vice" a ground for deporting an alien from the United States. Congress has seen fit to set forth with particularity and in clear and explicit terms the specific acts and course of conduct which if done or followed by an alien, subject him to deportation and, the Secretary of Labor has no power to amend or enlarge these provisions by his own "fiat." Congress alone has that power.

CONCLUSION

It is respectfully submitted that under the record as called to the court's attention and the points and authorities made and cited, the appeal should be sustained.

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